

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-37

In the Supreme Court of the United States

OCTOBER TERM, 1978

DEWAYNE F. TITUS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioner contends that he suffered actual prejudice and was denied his Fifth Amendment right to due process because of a 19-month interval between the completion of the investigation and the return of the indictment against him in this criminal tax case.

Following a non-jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully attempting to evade income tax for 1967-1969, in violation of 26 U.S.C. 7201; and of filing false tax returns for 1967 and 1968, in violation of 26 U.S.C. 7206(1) (Pet. App. 44-49). The district court sentenced him to two years' imprisonment and imposed a fine of \$18,000 (Pet. App. 6-9). The court of appeals affirmed (Pet. App. 2-5).¹

¹The petition is out of time. The court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* on May 25, 1978 (Pet. App. 1). On June 26, 1978, Mr. Justice Rehnquist denied

The court of appeals correctly held that petitioner did not demonstrate that he was prejudiced as a result of the 19-month interval between the completion of the Internal Revenue Service investigation and the return of the indictment. As this Court held in *United States v. Lovasco*, 431 U.S. 783, 789-790, the threshold question in assessing a claim of preindictment delay is whether the defendant suffered actual prejudice. If the delay in fact resulted in prejudice, the court must then examine the reason for the delay to determine whether it was impermissible under the circumstances. *Id.* at 788-796. See also *United States v. Gray*, 565 F. 2d 881, 892 (C.A. 5); *United States v. Lane*, 561 F. 2d 1075, 1077 (C.A. 2); *United States v. Partyka*, 561 F. 2d 118, 122 (C.A. 8); *United States v. Matlock*, 558 F. 2d 1328, 1330 (C.A. 8).

Here, as in the court of appeals, petitioner claims prejudice on the basis of "his deteriorating physical condition, missing documents, death of three witnesses, and faded recollections of other witnesses" (Pet. App. 4). But as the court of appeals pointed out (Pet. App. 4-5), petitioner's assertion that the testimony of three witnesses who died prior to trial would have assisted him does not amount to the kind of non-speculative demonstration of actual prejudice required by *Lovasco*. See *United States v. Pallan*, 571 F. 2d 497 (C.A. 9); *United States v. Gray*, *supra*; *United States v. Partyka*, *supra*. Indeed, the testimony of those witnesses would have been simply cumulative of other evidence in the case or of limited value in the impeachment of one prosecution witness (see Pet. 6-8, 17-19). Moreover, petitioner has not demonstrated how his "deteriorating" health (see Pet. 20-21) or allegedly missing

petitioner's application for an extension of time within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was not filed until July 5, 1978.

documents hampered his ability to present a defense. In sum, petitioner has not demonstrated with any specificity that he suffered any prejudice as a result of the preindictment delay, and the court of appeals' conclusion in any event presents no issue of general importance warranting review by this court.

Moreover, even on the assumption that petitioner established actual prejudice, his claim fails because he did not show that the delay was invidious as required by *Lovasco*. Petitioner does not even allege that the 19-month interval between completion of the investigation and the indictment was itself unreasonable or that the government delayed the indictment for an improper purpose.

The delay in this case between the completion of the special agent's investigation and the return of the indictment is not at all unusual for a criminal tax case of this type and complexity. The agent's recommendation was first reviewed within the Internal Revenue Service prior to referral of the case to the Tax Division of the Department of Justice, where it was subject to an independent review. During this period, petitioner raised the question of the propriety of prosecution in view of his physical condition (Pet. App. 54-55). The case was then transmitted to the United States Attorney, who again considered petitioner's physical condition before presenting the case to the grand jury (Pet. App. 54). Thus, at no time was the case "delayed" for the purpose of harassing or gaining any tactical advantage over petitioner. To the contrary, any delay was the result of great care taken by the government in determining whether petitioner should be prosecuted (Pet. App. 54-55).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.